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No.

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In The

Supreme Court of the United States

October Term, 1982

JAMES C. GABRIEL, Pro Se,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M.M. HENNELLY, JOHN H. LLOYD, D.B. JENKS and THOMAS J. O'LEARY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES C. GABRIEL
Petitioner, Pro Se
P.O. Box 94
Sea Girt, New Jersey 08750
(201) 449-2580

QUESTIONS PRESENTED

1. Does petitioner have a right to own property, to have his own personal property evaluated under due process of law, according to the Fifth and Fourteenth Amendments to the United States Constitution?

2. Does petitioner have the right to a jury trial, to have the jury evaluate his MoPac Class B shares under due process of law according to the Fifth and Fourteenth Amendments, without having a judge give his Rule 38 jury trial of right, (a) right preserved complaint to a magistrate to have the magistrate recommend that plaintiff has no right to evaluate his property under due process of law which is what the magistrate does to petitioner's property when the magistrate recommends that petitioner cannot sue in a federal court the defendants with any complaint that deals with the 1974 recapitalization, when that 1974 recapitalization is the guts of case, which controls the due process higher valuation in the 1974 recapitalization plan?

3. Did not the court of appeals err when it denied appellant's motion and affidavit notarized on March 17, 1982, when appellant had motioned the court for permission to submit to the court the reply brief of over 50 pages of meticulous findings to service the Internal Revenue Service Fraud Section and the Attorney General Office Fraud Section of the Justice Department both in Washington, D.C.?

4. Did not the court of appeals err when, on plaintiff's notarized motion and affidavit dated May 16, 1982, it refused to have itself and the defendants Missouri Pacific R.R. Co. of Missouri, service the Commissioner of the I.R.S., Mr. Roscoe Eggers, Fraud Section and Mr. William French Smith of the U.S. Justice Department, when plaintiff by motion exposed the fact that MoPac owed the I.R.S. many millions of dollars in capital

gains taxes for the transfer of over 61% of MoPac Class B stockholders cash and property value in a planned step by step conspiracy to defraud the United States under Section 371, Title 18, Chapter 19 because of the tens of millons of dollars owed to the U. S. Government I.R.S.?

5. How can a federal magistrate deny petitioner an evaluation of his Class B common stock property under due process of law of the Fifth and Fourteenth Amendments by taking a jury demand complaint under Rule 38 and make the jury trial a magistrate's case without the consent of the plaintiff?

6. Did not the court of appeals err when on June 30, 1982 it adjudged and ordered that the judgment of the district court be and is hereby affirmed, with costs taxed against appellant when appellant had appealed to the court by motions, by a brief, and reply brief that his jury trial demand was made into a magistrate's case by a judge without plaintiff's consent?

7. Has the Interstate Commerce Commission the constitutional right under the Fifth and Fourteenth Amendments and under the I.C.C. Code of Ethics to help take away the over 61% values of Class B without giving the Class B its equivalent values surrendered in a solvent prosperous railroad company such as MoPac was in 1973 when even Commission Division 3 admitted in the I.C.C.'s December 6, 1973 decision, it is not disputed that should the new preferred shares be converted into new common, as contemplated in the plan, the equity position of the Class B stockholders would be reduced from 61½% to 25½%.

8. What constitutional right did the Weinfeld Court have to have a MoPac Plan of Recapitalization under a Class B action Rule 23(a)(4) and (b) and under Rule 23(a), (b)(1) and (b)(2) F.R. of C.P. when Allegheny Corp. had a conflict of interest in regards to its Jones Motor Co. Transaction No. MC-F-1044, and

Allegheny Corp., as a Class B minority stockholders' representative in this class action plan had kept these salient facts a secret from its minority stockholders it represented?

9. What constitutional right did the Weinfeld Court have to have a MoPac Plan of Recapitalization under Class Action Rule 23 when Robert LeVasseur, as a Class B representative of the Class B minority stockholders possessed at the time of the Plan of Recapitalization 3,000 MoPac Class A shares and 336 Class B shares. LeVasseur kept the fact a secret of owning Class A and Class B at the same time. This was a conflict of interest.

10. How could there be *res judicata* in a jury trial complaint when plaintiff seeks due process evaluation of his property under the Fifth and Fourteenth Amendments, when there is present fraud, conflicts of interest and the hiding of important facts from the minority Class B stockholders in a class action under Class Action Rule 23(a), (b)(1) and (b)(2) of F.R.C.P. and Class Action Rule 23(a)(4) and (b), when the representative parties, such as Allegheny Corporation and Robert LeVasseur did not protect the interests of the class?

11. Does not the Sixteenth Amendment to the Federal Constitution also apply to a large corporate structure such as the Missouri Pacific Railroad Company when the railroad owes many tens of millions of dollars in capital gains taxes to the I.R.S. for the transfer of 61% of the Missouri Pacific R.R. Class B common stockholder's cash and property values to its own MoPac Class A $5 preferred $100 value stocks without MoPac having paid taxes to the I.R.S. for these Class B values it transferred to the Class A?

12. Isn't it fraudulent to use a Section 20(a) of the Interstate Commerce Act to recapitalize a railroad when Section 20(a) [49 U.S.C. §20(a)] is for "Issuance of Securities of Carriers"?

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MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M.M. HENNELLY, JOHN H. LLOYD, D.B. JENKS and THOMAS J. O'LEARY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner James C. Gabriel, Pro Se, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit entered in this case on June 30, 1982 in favor of the respondents. A petition for rehearing was denied on July 27, 1982.

OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit sur petition for rehearing by appellant dated July 27, 1982 appears on page 1a of the Appendix, *infra.*

JURISDICTION

The judgment order of the Court of Appeals herein was entered on June 30, 1982.

The sur petition for rehearing by the court en banc filed by apellant was denied and was entered July 27, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), the jurisdiction below having been based on diversity of citizenship, 28 U.S.C. §1332(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment — "No person shall be deprived of life, liberty or property, without due process of law."

Fourteenth Amendment — "Nor shall any state deprive any person of life, liberty or property without due process of law."

I.C.C. Finance Docket No. 27346;

67 Civil 5095 — *Levin v. Mississippi River Corp.*, S. Div. N.Y. Foley Square;

Title 28 U.S.C.S. §517, Interests of U.S. in Pendency Suits;

Conspiracy to Defraud United States Title 18, Section 371, Chapter 19;

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 722, 64 S. Ct. 1281;

Class Actions Rules 23(a)(1)(2)(3)(4);(b); (b)(1); and (b)(2);

Sanders v. United States, 373 U.S. 1-8, 83 S. Ct. 1068;

Section 20(a) [49 U.S.C. §20(a)] of the Interstate Commerce Act;

Section 20(b) [49 U.S.C. §20(b)] of the Act;

Beacon Theatres v. Westover U.S. District Judge, et al., 358 U.S. 500, 356 U.S. 956;

Dimick v. Schiedt, 292 U.S. 474, 486.

STATEMENT OF THE CASE

Petitioner seeks to have his jury trial of right Rule 38 civil complaint case reinstated as a jury trial complaint in the District Court of New Jersey, Newark, New Jersey and to have the Court set aside the order of Judge H. Lee Sarokin dated April 7, 1981, who had ordered the report and recommendation of Magistrate Perretti, filed December 31, 1980 by the magistrate, be adopted as the opinion of the Sarokin court whereby the report by Perretti had ordered that plaintiff be permanently enjoined from instituting any suit in the federal courts against any of the defendants or any other corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 recapitalization.

Petitioner respectfully requests that the report and recommendation of Magistrate Perretti be denied by the Court because it violates petitioner's Civil No. 78-1476 jury trial complaint and for due process evaluation of petitioner's Class

B common shares be reinstated as a jury trial according to Rule 38 Jury Trial of Right — (a) Right preserved."The right of trial by jury as declared by the Seventh Amendment to the Constitution of the United States or as given by a statute of the United States shall be preserved to the parties inviolate"; (d) Demand — "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." Petitioner did not consent to have his jury demand complaint withdrawn, and therefore his complaint must be reinstated as a jury trial.

Petitioner, *pro se,* on behalf of himself, is appealing from the order, findings of fact, conclusions of law of Hon. Frederick B. Lacey, U.S.D.J., of the United States District Court, District of New Jersey, Newark, New Jersey, original filed in the Clerk's Office on July 23, 1981, which was a denial by the Lacey court for appellant to get a jury trial for the jury to direct the court to order the I.C.C. to evaluate appellant's property in Missouri Pacific Railroad Class B Common shares according to Section 19(a) [49 U.S.C. §19(a)] of the Interstate Commerce Act — "Evaluation of Property of Carriers" so that the I.C.C. finds the true value of appellant's Class B shares under due process of law according to the Fifth and Fourteenth Amendments, the values to be relayed to the Missouri Pacific R.R., which would issue appellant stock equal in value to the Class B appellant gave them — equal Class B values given for equal new MoPac values received in return. Appellant respectfully pleads that his Civil No. 78-1476 jury trial case be reinstated in the District Court, Newark, New Jersey as a jury trial case, according to Rule 38, Jury Trial of Right. — (a) Right Preserved. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." (d) Waiver. — "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Appellant entered his complaint — Civil No. 78-1476 jury trial, as a jury trial demand case and appellant wants it kept as a jury trial case.

In *Beacon Theatres v. Westover U.S. District Judge et al.,* certiorari to the U.S. Court of Appeals for the Ninth Circuit Mr. Justice Black delivered the opinion of the court.

> "We granted certiorari 356 U.S. 956 because maintenance of a jury trial as a fact finding body is of such importance that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt,* 293 U.S. 474, 486.

Rule 38. Jury Trial of Right — (a) Right preserved — "The right of trial by jury as declared by the Seventh Amendment or as given by a statute of the United States shall be preserved by parties inviolate" which is plaintiff's demand of trial by jury, which shall be in conformity with plaintiff's complaint, filed July 3, 1978, jury demand of plaintiff filed July 13, 1978, Civil No. 78-1476 Jury Trial.

(d) Waiver. — "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." Petitioner did not consent to have his jury trial withdrawn and made into a magistrate's case. The Honorable Sarokin court, in the United States District Court, District of New Jersey in Newark, N.J. had no constitutional right to deprive plaintiff Gabriel, *pro se,* of plaintiff's jury trial of right case - Civil No. 78-1476 Jury Trial Case, and give it to a magistrate to "report and recommend" simply because Judge Sarokin had a "heavy case load." Therefore, petitioner Gabriel respectfully prays that plaintiff's jury trial complaint be reinstated in the District Court of New Jersey as a jury trial case, or that the Supreme Court

orders the I.C.C. to evaluate petitioner's Class B MoPac stocks under due process of law according to the Fifth and Fourteenth Amendments and Section 19 of the Act, to find true value of MoPac Class B stocks.

It is an uncontested fact that there never has been a due process evaluation of the MoPac Class common stock.

REASONS FOR GRANTING THE WRIT

This is a constitutional question. The granting of the writ will restore petitioner Gabriel's constitutional rights under the Fifth and Fourteenth Amendments to due process evaluation of his Class B common stock property.

1. Petitioner is a dissenter Class B stockholder of the Missouri Pacific Railroad Co. (MoPac), who on June 15, 1973 voted against the approval of the Plan of Recapitalization of MoPac under a Section 20(a) proceeding because (1) the "Plan" offered a reduction of ownership to the common Class B only, 25.5% from its 61.5% ownership and to the Class A $5 preferred an increase to 74.5% ownerhsip from its 34.5%, of the consolidated stockholders equity of the company on an I.C.C. accounting basis. *See* 347 I.C.C. pages 397-398; because (2) Section 20(a) [49 U.S.C. §20(a)] of the Interstate Commerce Act is for "Issuance of Securities of Carriers (capital stocks or bonds or evidence of indebtedness; (3) Section 20(b) [49 U.S.C. §20(b)] is for "Modification of Railroad Financial Structures" whereby under Section 20(b)(2) the proposed alteration or modification (c) will be in the best interests of the carrier, of each class of its stockholders.

2. Petitioner respectfully prays that this Court grants him a writ of certiorari in order to help vacate the magistrate's report and recommendation which is against petitioner's constitutional

rights of due process of law evaluation of his Class B MoPac common stock property under the Fifth and Fourteenth Amendments: "No person shall be deprived of life,liberty, or property without due process of law". It will also vacate Judge H. Lee Sarokin's April 7, 1981 order and Judge Frederick B. Lacey's order of July 22, 1981, both of which are based upon Magistrate Perretti's report and recommendation.

The Perretti report and recommendation permanently enjoins plaintiff from instituting any suit regarding any matter "alleged in the complaint that deals with the 1974 recapitalization. The 1974 recapitalization of MoPac of December 3, 1972 gives Class B only 25.5% of the consolidated equity of the company on an I.C.C. accounting bases from its 61.5% of Class equity as the holder of the residual rights of the assets of the company and gives the Class A $5 preferred an increase to 74.5% of such stockholders' equity from its 34.5%. The magistrate's report and recommendation, if petitioner is permanently enjoined, means that petitioner cannot sue against the 1974 recapitalization in order to get a due process evaluation of his Class B MoPac common stock property under the Fifth and Fourteenth Amendments of the U.S. Constitution to find Class B true value, in order to exchange Class B true value for new MoPac common stock. This is according to the United States Supreme Court in *Schwabacher v. United States, et al.*, 334 U.S. 182 (1948). The Interstate Commerce Commission's decisions show that Section 20(b) are the proper precedents to follow in such a proceeding, that stockholders are entitled to securities under Section 20(b) based on their contribution to or investment value in the company, the investment value rule applied by the Supreme Court in the *Schwabacher* and *Otis* cases. *Otis & Co. v. S.E.C.*, 323 U.S. 624 (1945). ["The proposed alteration or modification will be in the best interests of the carrier, of each class of its stockholders." Section 20(b)(2)(c)].

3. The granting of the writ will eventually enable petitioner to get due process evaluation of his Class B common stocks by the Supreme Court ruling that the Interstate Commerce Commission evaluate Class B common stocks under due process of law by the I.C.C. by following the Fifth and Fourteenth Amendment to the Federal Constitution, and under Section 19(a) [49 U.S.C. §19(a)] of the Act — "Evaluation of Property of Carriers", to find Class B true value, so that this true value will enable the U.S. Government I.R.S. to have the true value become the basis of the value of Class B common, upon which value the I.R.S. will become enabled to calculate how much of the Class B value was transferred to the Class A $5 preferred, based upon the I.C.C.'s figures that Class B value in the"Plan of Recapitalization", went from 61.5% to 25.5% (347 I.C.C. pages 397, 398).

At the present time without a due process evaluation of Class B under the Fifth and Fourteenth Amendments to find Class B true value the Sixteenth Amendment cannot be enforced against MoPac for the transfer of Class B ownership from its 61.5% ownership to only 25.5% ownership, when at the same time the Class A $5 preferred had an increase of ownership from 34.5% to 74.5% of the consolidated stockholder's equity on an I.C.C. accounting basis. (347 I.C.C. pages 397-398).

CONCLUSION

For the many reasons stated,

1. Petitioner respectfully recommends that this Court rule against the report and recommendation of Magistrate Serena Perretti filed on December 31, 1980 who had dismissed plaintiff's complaint because he seeks due process. Her report is unconstitutional, it is against due process of law evaluation under the Fifth and Fourteenth Amendments of petitioner's Class B property. She denies appellant has any right to sue defendants for due process evaluation.

2. That this Honorable Court rule that this case goes to the District Court in Newark, N.J. for jury trial, for the jury, to direct the judge to order the Interstate Commerce Commission evaluate petitioner's Class B equity bearing Class B common shares under due process of law, according to Section 19(a) for the "Valuation of Property of Carriers." According to 290 I.C.C. 477, at pages 624 and 625, the Class "B" stock was awarded only a small amount in actual par value but it was made the "residuary beneficiary" of the Missouri Pacific Railroad Co., heir to 16,738,413 acres of land grants, fabulously by rich in reserves of natural gas, oil, coal and trivia. This is one of the reasons why Union Pacific seeks to merge with Missouri Pacific Railroad Company and Missouri Pacific Corporation, as brought out before the Interstate Commerce Commission in Finance Docket Nos. 30,000 et al., Union Pacific Corporation, Pacific Rail System — Control — Missouri Pacific Corporation and Missouri Pacific Railroad Company — Control — Western Pacific R.R. Co.

3. Petitioner respectfully recommends the denial, the rejection of the order of Hon. Frederick B. Lacey of the United States District Court of the District of New Jersey dated July 22, 1981

and of Judge H. Lee Sarokin dated April 7, 1981 who had adopted the report and recommendation of Magistrate Perretti filed December 31, 1980 as the opinion of his court, dismissing petitioner's complaint and who had permanently enjoined plaintiff from instituting any suit in the Federal Court (for any suit for due process evaluation of Class B would be such a suit) against any defendants, corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 Recapitalization, because that order of Sarokin is unconstitutional and against due process of law evaluation of my Class B property under the Fifth and Fourteenth Amendments because if I was permanently enjoined from instituting any suit in the Federal Court against any of these defendants or any other corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 Recapitalization, then I cannot sue the company for due process evaluation of my Class B because that would be suing against the 1974 Recapitalization of $214.50 per Class B share.

Respectfully submitted,

JAMES C. GABRIEL
Petitioner Pro Se